

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

LEON RICHARDSON,)
vs.)
Plaintiff,) Case No.: 2:13-cv-1913-GMN-CWH
vs.)
HRHH GAMING SENIOR MEZZ, LLC, a) **ORDER**
Delaware Limited Liability Company;)
BENNIE MANCINO, an individual,)
Defendants.)

Pending before the Court is Defendant Bennie Mancino's Motion to Dismiss, (ECF No. 32), Plaintiff Leon Richardson's Opposition to the Motion to Dismiss, (ECF No. 36), and Defendant Mancino's Reply, (ECF No. 38). For the reasons set forth below, the Motion to Dismiss is **DENIED**.

I. BACKGROUND

This case concerns allegations of racial discrimination and other racially-motivated misconduct that occurred during the culmination of Plaintiff’s employment with Defendant HRHH Gaming Senior Mezz, LLC (“HRHH”). Plaintiff’s employment with Defendant HRHH began in 2005, (First Am. Compl. ¶ 5, ECF No. 31), and continued until March 2012. (*Id.* at ¶ 12). At that time, another HRHH employee, Defendant Mancino, informed Plaintiff that his employment was being suspended pending an investigation into a suspected company policy violation. (*Id.*). Despite Plaintiff’s contentions that no policy violation occurred and that the policy Defendant Mancino accused him of violating did not even actually exist, (*Id.* at ¶¶ 12-13). Defendant HRHH terminated Plaintiff’s employment “on or about April 1, 2012.”¹ (*Id.* At

¹ Later in the FAC, Plaintiff lists April 3, 2012 as the date of termination. (FAC ¶¶ 54-55).

1 ¶¶ 5, 9).

2 On October 18, 2013, Plaintiff—proceeding *pro se*—filed his original Complaint in this
 3 Court. (ECF No. 1). The original Complaint contained a Title VII racial discrimination claim, a
 4 wrongful discharge claim, and a punitive damages claim against Defendants HRHH and
 5 Mancino. (Compl. ¶¶ 16-32, ECF. No. 1). Defendant Mancino moved to dismiss all three
 6 claims against him pursuant to Federal Rule of Civil Procedure 12(b)(6), (ECF No. 8), and after
 7 a hearing, the Court granted the motion, (Minutes of Proceedings, ECF No. 28). The Court
 8 dismissed the punitive damages claim with prejudice, but dismissed the remaining two claims—
 9 Title VII racial discrimination and wrongful termination—without prejudice. (*Id.*). Plaintiff then
 10 filed his First Amended Complaint (“FAC”) on August 20, 2014, asserting claims of defamation
 11 and intentional interference with prospective economic advantage against Defendant Mancino.
 12 (FAC ¶¶ 53-73). Defendant Mancino now moves to dismiss these claims under Fed. R. Civ. P.
 13 12(b)(6). (ECF No. 32).

14 **II. LEGAL STANDARD**

15 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
 16 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
 17 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on
 18 which it rests, and although a court must take all factual allegations as true, legal conclusions
 19 couched as factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule
 20 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements
 21 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain
 22 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
 23 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). “A claim has
 24 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
 25 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This

1 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*
 2 Nevertheless, the Supreme Court has instructed “federal courts to liberally construe the ‘inartful
 3 pleading’ of pro se litigants.” *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987).

4 **III. ANALYSIS**

5 According to Defendant Mancino, Plaintiff’s defamation claim is barred by Nevada’s²
 6 two-year statute of limitations and therefore fails to state a claim upon which relief may be
 7 granted. (Mot. to Dism. 4:16-18). Plaintiff does not dispute that the statute of limitations has
 8 run, but instead argues that the defamation claim survives because it relates back to October 18,
 9 2013—the date the original Complaint was filed. (Opp. 11:14-16).

10 Additionally, Defendant Mancino argues that the intentional interference with
 11 prospective economic advantage (“IIPEA”) claim² should be dismissed because it “suffers from
 12 the fatal defect of missing a third party to interfere with [Plaintiff’s] employment relationship.”
 13 (Reply 7:6-7). He further argues that dismissal is warranted because the allegations underlying
 14 the IIPEA claim do not involve a “strong public policy,” which is necessary to overcome
 15 Nevada’s at-will employment rule. (Mot. to Dism. 8:7-9). Plaintiff refutes both arguments,
 16 stating that Defendant Mancino is a third party to the employment relationship between Plaintiff
 17 and HRHH, (Opp. 14:27-28), and that Defendant Mancino’s public policy argument is
 18 inapposite because the IIPEA claim was brought against Defendant Mancino in his individual
 19 capacity. (*Id.* at 16:21-24). Plaintiff alternatively contends that Nevada’s public policy against
 20 defamation is strong enough to constitute an actionable interference with prospective economic
 21 advantage in the at-will employment context. (*Id.* at 16:3-21).

22 **A. Defamation**

23 Under Federal Rule of Civil Procedure 15(c)(1)(B), a claim initially set forth in an

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25 ² The Court is not persuaded by Defendant Mancino’s additional argument that the IIPEA claim should be
 dismissed because it is somehow duplicative of Plaintiff’s defamation claim. (Mot. to Dism. 8:23-25); (Reply 8:4-
 5). Defendant Mancino offers no legal authority in support of this argument, and the Court agrees with Plaintiff’s
 statement that “the Defendant should not be permitted to decide which theory [of recovery] the Plaintiff pursues.”
 (Opp. 17:2-9) (citing Fed. R. Civ. P. 8).

1 amended complaint relates back to the date of a prior filing if the claim “ar[ises] out of the
 2 conduct, transaction, or occurrence set out—or attempted to be set out—in the original
 3 pleading.” A claim “arises out of the same conduct, transaction, or occurrence if it will likely be
 4 proved by the same kind of evidence offered in support of the original pleading.” *ASARCO, LLC*
 5 *v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (internal quotations omitted).
 6 Additionally, both the original complaint and the amended complaint must share “a common
 7 core of operative facts” in order to afford the defendant “fair notice of the transaction,
 8 occurrence, or conduct called into question.” *Id.* (quoting *Martell v. Trilogy Ltd.*, 872 F.2d 322,
 9 325 (9th Cir. 1989)). Yet, in the Ninth Circuit, the relation back doctrine is to be “liberally
 10 applied.” *Id.* (quoting *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d
 11 1240, 1259 n. 29 (9th Cir. 1982)). As explained below, the Court finds that the defamation
 12 claim relates back to the date the original Complaint was filed.

13 **1. Common Core of Operative Facts**

14 According to Defendant Mancino, the defamation claim does not relate back because the
 15 original Complaint failed to put him on notice “that Plaintiff was either pursuing or attempting
 16 to pursue a claim of defamation against him.” (Mot. to Dism. 6:20-22). However, whether a
 17 defendant has fair notice of the transaction, occurrence, or conduct being called into question
 18 depends only on the commonality of the facts alleged in the initial and amended pleadings.
 19 *ASARCO, LLC*, 765 F.3d at 1004; *see also Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 737 (9th
 20 Cir. 1982) (“[A]n amendment which changes the legal theory on which an action initially was
 21 brought is of no consequence to the question of relation back if the factual situation out of which
 22 the action arises remains the same and has been brought to the defendant’s attention by the
 23 original pleading.” (internal citations omitted)).

24 In *Santana*, a hotel manager told the plaintiff’s employer that the plaintiff had made
 25 inappropriate sexual advances toward hotel employees during his stay. 686 F.2d at 737. The

1 plaintiff's employment was terminated as a result, and in his original complaint, he asserted a
 2 claim against the hotel for slander. *Id.* The Ninth Circuit allowed the plaintiff to amend his
 3 complaint to include an interference with employment relations claim even though the statute of
 4 limitations had run, because the original pleading provided the defendant with "notice of the
 5 factual basis of Santana's claim for interference with employment relations." *Id.* at 739. The
 6 *Santana* Court based its conclusion on a particular portion of the complaint, which stated: "[a]s
 7 a direct and proximate result of the actions of the defendants, plaintiff was terminated from his
 8 position of employment at Hughes Air West from the period of May 1, 1978 through June 29,
 9 1979 and received no compensation for this period, in excess of one year." *Id.*

10 In contrast, in *Percy v. San Francisco General Hospital*, the plaintiff brought a post-
 11 termination Title VII claim against his former employer, the city of San Francisco. 841 F.2d
 12 975, 976-77 (9th 1988). The plaintiff later attempted to amend his complaint to include a §
 13 1983 claim, which alleged due process violations stemming from a confirmatory termination
 14 hearing held by the city's Civil Service Commission. *Id.* at 977. The Ninth Circuit affirmed the
 15 trial court's conclusion that the § 1983 claim did not relate back because it "arose out of a set of
 16 facts distinct from those supporting his Title VII claim." *Id.* at 979. It explained, "Percy's
 17 original complaint alleged only facts having to do with his claim of racial discrimination in his
 18 termination by the Hospital. Nowhere in the complaint did Percy suggest there were defects in
 19 the Civil Service Commission proceedings." *Id.*

20 In this case, the allegations in the original Complaint raise an inference that Defendant
 21 Mancino defamed³ Plaintiff. In the original Complaint, Plaintiff alleged that: Defendant
 22 Mancino called Plaintiff into his office "regarding an incident that occurred on March 26, 2012,"
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24 _____
 25 ³ To succeed on a defamation claim in Nevada, a plaintiff must prove: "(1) a false and defamatory
 statement of fact by the defendant concerning the plaintiff; (2) an unprivileged publication to a third
 person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Tsao v. Desert
 Palace, Inc.*, 698 F.3d 1128, 1148 (9th Cir. 2012) (quoting *Pope v. Motel 6*, 114 P.3d 277, 282 (Nev.
 2005)).

1 (Compl. ¶ 4); Defendant Mancino informed Plaintiff that, pending an investigation, Plaintiff was
 2 being suspended, (*Id.*); Defendant Mancino falsely accused Plaintiff of violating a company
 3 policy, (*Id.*); and Defendant Mancino and Defendant HRHH wrongfully terminated Plaintiff for
 4 a fictitious policy violation, (*Id.* at ¶ 25). Plaintiff also alleged in the original Complaint that
 5 “Defendant HARD ROCK [sic] expressly authorized the termination of Plaintiff based upon the
 6 decision of BERNIE [sic] MANCINO.” (*Id.* at ¶ 30).

7 Taking these allegations as true and construing them liberally in Plaintiff’s favor, they
 8 reflect the same core of operative facts underlying the defamation claim in the FAC. *See* (FAC
 9 ¶¶ 12-14, 18-19). Thus, the original Complaint sufficiently “put Defendant Mancino on notice
 10 that he is alleged to have made false statements of fact concerning the Plaintiff to persons having
 11 the authority to terminate the Plaintiff’s employment.”⁴ (Opp. 11:28–12:3).

12 2. Same Kind of Evidence

13 Defendant Mancino further contends that “new evidence and witnesses will be needed to
 14 support” the defamation claim, and therefore the claim does not arise out of the same conduct,
 15 occurrence, or transaction set forth in the original Complaint. (Reply 4:27–5:2). In support of
 16 this argument, Defendant Mancino points out that, “[F]or the first time, the First Amended
 17 Complaint lists David Munoz as the party to which the alleged false and defamatory statement
 18 was published along with other unnamed managers.” (*Id.* at 5:2-4). The allegation in the
 19 original Complaint that “Defendant HARD ROCK [sic] expressly authorized the termination of
 20 Plaintiff based upon the decision of BERNIE [sic] MANCINO,” indicates that some of HRHH’s
 21 employees would be called to testify regarding Defendant Mancino’s role in Plaintiff’s
 22 termination. (Compl. ¶ 30). The fact that the FAC is more specific as to which of HRHH’s

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 24 ⁴ It is of no consequence that the original Complaint is allegedly “missing facts necessary to plead the new
 25 defamation theory.” (Reply 4:22-23). The relation back inquiry focuses on “the conduct, transaction, or
 occurrence set or—or attempted to be set out—in the original pleading.” Fed. R. Civ. P. 15(c)(1)(B) (emphasis
 added); *see also Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 736 (9th Cir. 1988) (“Under Rule 15, the
 only question is whether the later claims arise out of the conduct, transaction, or occurrence brought to the
 defendant’s attention by the initial claim.”).

1 managers heard the allegedly defamatory statements does not lead to the conclusion that a
 2 different kind of evidence will be required to prove the defamation claim. Moreover, comparing
 3 the original Complaint's reference to a "Pit Manager," (*Id.* at ¶ 6), to the FAC's reference to "Pit
 4 Manager David Munoz," (FAC ¶ 13), reveals that David Munoz is likely the same individual
 5 described in the original Complaint, and therefore he presumably would have been called as a
 6 witness based on the original allegations.

7 Because the defamation claim will likely be proved by the same kind of evidence that
 8 would be offered in support of the allegations in the original Complaint, and because the
 9 defamation claim shares a common core of operative facts with the claims set forth in the
 10 original Complaint, the Court finds that the defamation claim arises out of conduct, transactions,
 11 or occurrences set out in the original Complaint.

12 So long as a party is notified of litigation concerning a particular transaction or
 13 occurrence, that party has been given all the notice that Rule 15(c) requires.
 14 When a defendant is so notified, 'the defendant knows that the whole transaction
 15 described in it will be fully sifted, by amendment if need be, and that the form of
 the action or the relief prayed or the law relied on will not be confined to their
 first statement.'

16 *ASARCO, LLC*, 765 F.3d at 1006 (quoting *Martell*, 872 F.2d at 326). The defamation claim
 17 relates back to the date the original Complaint was filed and is therefore not barred by the statute
 18 of limitations. Accordingly, Defendant Mancino's Motion to Dismiss will be denied as to the
 19 defamation claim.

20 **B. Intentional Interference with Prospective Economic Advantage**

21 Defendant Mancino also moves to dismiss Plaintiff's intentional interference with
 22 prospective economic advantage claim. In Nevada, to succeed on an IIEPA claim, a plaintiff
 23 must prove:

24 (1) a prospective contractual relationship between the plaintiff and a third party; (2)
 25 knowledge by the defendant of the prospective relationship; (3) intent to harm the
 plaintiff by preventing the relationship; (4) the absence of privilege or justification
 by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's
 conduct.

1 1 *In re Amerco Derivative Litig.*, 252 P.3d 681, 702 (Nev. 2011) (quoting *Wichinsky v. Mosa*, 847
 2 2 P.2d 727, 729-30 (Nev. 1993)).

3 3 The District of Nevada has previously found a prospective contractual relationship to
 4 4 exist between an employer and an at-will employee.⁵ *See, e.g., Cummings v. United Healthcare*
 5 5 *Servs., Inc.*, No. 2:13-CV-00479-APG-GWF, 2014 WL 1302029, at *8 (D. Nev. Mar. 31, 2014);
 6 6 *Lauster v. Grand Sierra Resort Corp.*, No. 3:10-CV-00305-RCJ-RAM, 2010 WL 5477766, at
 7 7 *2 (D. Nev. Dec. 29, 2010). The District of Nevada has also held, however, that an entity
 8 8 cannot tortiously interfere with a contract to which it is a party. *Blanck v. Hager*, 360 F. Supp.
 9 9 2d 1137, 1154 (D. Nev. 2005) (citing *Bartsas Realty, Inc. v. Nash*, 402 P.2d 650, 651 (Nev.
 10 10 1965)), *aff'd*, 220 Fed. Appx. 697 (9th Cir. 2007). Because agents of an employer acting within
 11 11 the scope of their employment are parties to the employer's contracts, they are not appropriate
 12 12 parties against which IIEPA claims may lie. *Welder v. University of S. Nev.*, 833 F. Supp. 2d
 13 13 1240, 1244 (D. Nev. 2011); *Lauster*, 2010 WL 5477766, at *6.

14 14 In *Lauster*, an IIEPA claim brought against a number of defendants including the
 15 15 plaintiff's former employer and its president was dismissed by the district court judge. 2010 WL
 16 16 5477766, at *1. Noting that the Nevada Supreme Court had yet to determine if a IIEPA claim in
 17 17 the at-will employment context was viable, the district court judge in *Lauster* decided that "an
 18 18 at-will employee may sue a third party who interferes with his employment relationship, because
 19 19 that person has tortiously interfered with his prospective economic advantage. However, the
 20 20 nature of the interference must implicate the 'strong public policy' of the state." *Id.* at *4.
 21 21 Defendant Mancino interprets this holding to support his argument that Plaintiff's IIEPA claim
 22 22 should be dismissed because he is not a third party to the employment relationship, and
 23 23 defamation does not implicate the strong public policy of the state. (Mot. to Dism. 8:7-28);
 24 24 (Reply 5:14-17, 6:18-7:10).

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 5 Both parties seem to agree that Plaintiff's employment was at will. (Mot. to Dismiss 7:1-8:28); (Opp. 14:14-28).

However, in analogizing *Lauster* to the instant case, Defendant Mancino fails to consider that the *Lauster* plaintiff only “implie[d] that [the defendants] were acting as agents of the employer” and “allege[d] no facts concerning how any [d]efendant wrongfully influenced [the employer] in a private capacity to terminate Plaintiff.” *Lauster*, 2010 WL 5477766, at *6. The inverse is true of the allegations in the instant FAC.

Plaintiff has alleged facts—“Defendant Mancino’s acts were done with malice, oppression, fraud (express or implied), and/or willful intent to injure the Plaintiff,” (FAC ¶ 73,)—that, when taken as true, are sufficient to support a plausible inference that Defendant Mancino acted outside the scope of his employment and not as an agent of Defendant HRHH.⁶ See, e.g., *Cummings*, 2014 WL 1302029, at *9. These facts are also sufficient to convert Defendant Mancino into a third party to the employment relationship, against which a claim for IIEPA may lie. Because the IIEPA claim is brought against Defendant Mancino in his individual capacity, it is not necessary for the Court to decide whether defamation implicates the strong public policy of the state such that the Nevada Supreme Court would recognize it as an exception to the at-will employment doctrine. All the elements of IIEPA are adequately pled in the First Amended Complaint, and Defendant Mancino’s Motion to Dismiss will be denied as to the IIEPA claim.

IV. CONCLUSION

IT IS HEREBY ORDERED that Defendant Mancino's Motion to Dismiss, (ECF No. 32), is **DENIED**.

DATED this 10th day of March, 2015.

5. 

Gloria M. Navarro, Chief Judge
United States District Judge

⁶ Even though Plaintiff concedes that it is unresolved whether Defendant Mancino acted in a supervisory capacity and thus as an agent of Defendant HRHH, (Opp., 15:17–16:2), the issue is sufficiently pled and need not be resolved at this time.